In the

Supreme Court of the United States

October Term 1947

No. 623

CARL F. DELANO, Petitioner

v.

STATE OF MICHIGAN

On application for certiorari to the Supreme Court of the State of Michigan.

Brief Opposing Petition for Certiorari

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I

Opinion of Court Below.[*]

The opinion (897) of the court below is officially reported as *People v. Delano,* 318 Mich. 557.

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[*]

Unless otherwise plainly indicated, numbers in parentheses throughout this brief refer to pages of the printed record.

II

Counter-Statement on Jurisdiction.

Petitioner invokes the jurisdiction of this Court under § 237 of the Judicial Code as amended, Title 28 U.S.C., § 344 (b), and Supreme Court Rule 38; and he claims that substantial federal questions were timely raised in the court of original jurisdiction and again on review in the Supreme Court of the State of Michigan.

It is our position: (1) that certain questions presented to this Court in the petition, and in the brief of the petitioner, were never raised in the court below in any aspect whatsoever, state or federal;[1] (2) that the court below decided no federal questions, substantial or otherwise; (3) that in the court below the petitioner did not clearly, plainly and specifically set up any claim that his right to due process, guaranteed by the Fourteenth Amendment, had been violated; (4) that if such a claim appears in motions

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[1]

Immediate reference is had to the 4th question stated in the petition for certiorari, p. 8, wherein for the first time petitioner challenges the qualification of a Justice of the Michigan Supreme Court to participate in the review of this cause. There is absolutely no ground for such a contention, and the question was not raised in the court below by affidavit of prejudice or on motion for rehearing (916), or in any other manner. A similar attack, likewise unfounded, is made upon the good faith of another member of the same court when petitioner intimates, p. 21, that the Chief Justice who as circuit judge had issued the warrant for petitioner's arrest, participated in the denial of his motion for rehearing. Counsel's misapprehension is based upon a mistake in the printing of the order of such denial (945); the name of the Chief Justice was stricken in the journal entry as appears from a corrected copy forwarded by the clerk.

addressed to the trial court, [2] it is couched in vague and general terms; (5) that if such a claim was included in any of petitioner's assignments of error (802-872, at 803) it was cloaked in general terms, and it was abandoned upon failure to present any specific, special federal question in petitioner's brief;[3] and (6) that if such a claim was made in petitioner's brief, it was obscurely set forth in his statement of facts—again in general terms and without specification.

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[2]

See motion to quash (872-875); motion for separate trial (875-877); and motion for new trial (878-881).

[3]

The rule in Michigan is that where a question is not briefed it will be considered abandoned. Likewise an assignment of error: People v. Thompson, 221 Mich. 621; People v. Harter, 244 Mich. 346; People v. Bark, 251 Mich. 228; People v. Reading, 307 Mich. 616. Cf. People v. Smith, 260 Mich. 486. Mich. Court Rule 67, par. 1.

III

Counter-Statement of the Case.

We deem it necessary to correct the following inaccuracies and omissions in the petitioner's statement of the matter involved:[4]

1. It is said, p. 2, that the grand jury proceedings out of which emerged the warrant issued in this cause, 'were commenced on complaint of Herbert J. Rushton, Attorney General for the State of Michigan'; and, on p. 20, that 'the reason for the disqualification of Judge (Mr. Justice) Dethmers is more apparent because the proceedings for the . . . grand jury was instituted by his predecessor in office, the Honorable Herbert J. Rushton'.

We hasten to add that long before the warrant was issued, Attorney General Rushton had withdrawn from the grand jury investigation; that the warrant for petitioner's arrest was issued on recommendation of the special prosecuting attorney who was appointed in the latter's place and stead; that thereafter the department of the Attorney General took no part in the prosecution of this cause, nor was it consulted therein; and that the Attorney General had no connection with the matter until subsequent to the 1st day of January 1947, four months after Attorney General Dethmers had taken his oath of office as Justice of the Michigan Supreme Court. The precise truth of the matter is that Mr. Dethmers had nothing whatsoever to do with the case during his entire term of office as Attorney General.

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[4] Supreme Court Rule 27, par. 4.

2. Petitioner states, on p. 2, that the special prosecuting attoney who tried the cause for the State, is now Governor of Michigan;[4] on page 6, that the circuit judge who issued the warrant for petitioner's arrest on the charge of conspiracy to corrupt the legislature of the State, is now a member of the Michigan Supreme Court;[5] and that the Attorney General who was in office during the pendency of this cause in the circuit court and later on appeal in the Supreme Court, was appointed Justice of Michigan's highest court late in 1946.[6]

3. While it is true that petitioner's motion to quash (872) the information was based in part on the ground, vaguely asserted without specifications, that the prosecution was in violation of the due process clause of the Fourteenth Amendment (873), and although such a general statement is found in his 8th assignment of error (803-804), no federal question was stated in petitioner's brief on file in the

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[4]

The wholly unjustified insinuation throughout the petition and brief is that the Governor of Michigan attained his high position by disregarding the constitutional rights of persons accused of corrupting the legislature of this State. Nothing could be further from the truth.

[5]

This Justice, however took no part in the proceedings on appeal, and did not participate (as counsel intimates) in denial of petitioner's motion for rehearing.

[6]

We repeat: the Attorney General who was in office during the trial of this cause, had nothing whatsoever to do with the matter then or at any other stage of the proceedings.

Michigan Supreme Court, as required by rule,[7] nor was a federal question presented to or decided by the court below.

4. Although the circuit judge who conducted the investigation and issued the warrant, presided as examining magistrate and later heard and denied petitioner's motion to quash (872) and motion for a separate trial, the petitioner never filed an affidavit of prejudice, and the record fails to disclose that he ever challenged the qualification of the circuit judge, or that he raised the question in the trial court. The record does not include the transcript of the preliminary examination; the question was not raised on motion to quash (872-875); it was not presented in the motion for a separate trial (875-877), and it was not mentioned in the motion for a new trial (878-881). It was first raised when assigned as error (803) in the court below. But it was abandoned in appellant's brief. And the court below did not decide or consider it.

5. Although petitioner averred (804) in his assignments of error that certain impromptu remarks of the prosecuting attorney 'were calculated to and did bias the jurors in consideration of the case, resulting in a miscarriage of justice', he made no special claim that by virtue of such remarks he was deprived of his liberty without due process of law, nor did he contend that any right guaranteed by the Fourteenth Amendment had been violated. And he did not brief the federal question now raised for the first time.

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[7]

Michigan Court Rule 67, § 1, requires that beginning on the first page of the brief appellant shall concisely and without repetition, 'state the questions involved in the appeal. . . Ordinarily no point will be considered which is not set forth in or necessarily suggested by the statement of questions involved'.

6. It is also true, pp. 4-5, that at the conclusion of the State's proofs petitioner moved for a directed verdict (648) on the ground (here shortly state) that the charge of conspiracy set forth in the information and disclosed by the proofs, was not an offense known to the common law or to the law of Michigan. But petitioner's motion for a directed verdict asserted no federal right, alleged no denial of due process, and was based solely upon non-federal grounds. The motion was grounded on counsel's contention (again urged here) 'that there may not be a conspiracy founded upon a charge to commit bribery between persons, one charged with the intended taking, and several charged with the giving of the same bribe'. This, for some strange reason, is now said to present a federal question.

We, therefore, deem it necessary to a clear understanding of the questions involved, that we explain, in the language of the court below, and as summarily as possible, the nature of the offense committed by the petitioner, 318 Mich. at p. 567:[8]

> "In the case at bar, the common-law conspiracy charged in the people's information was broad in scope and required a number of participants. There is evidence that a group of people organized to promote a bill to legalize the practice of a profession of which they were members; they hired Williams as a lobbyist who arranged for the introduction of the bill in the senate by paying two senators the 'cost' of such legislative

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[8]

The petitioner, Senator Delano, did not take the stand to deny the testimony of competent witnesses to the effect that he had involved himself in the conspiracy charged in the information; nor did he deny the accusation in his motion for new trial; but he has chosen to rely on technicalities throughout.

process; that the group held frequent meetings, the main purpose of which was the raising of money to be expended by Williams in influencing such legislation; that defendant Sherman was active in the raising of funds for such purpose; that defendant DeLano (the petitioner here) was paid $2,000 and agreed to use such sum to influence members of the committee of the house of representatives to release the bill and thus assure its final passage.

The record contains competent evidence to sustain the charge that a conspiracy was formed for the purpose of corrupting the legislature by means of bribery. It was not necessary that DeLano and Sherman have knowledge of its inception or all of its ramifications. . . . Nor was it necessary that they know all of the conspirators . . . We conclude that the conspiracy to corrupt the legislature as charged in the warrant and information is an offense punishable under the laws of Michigan".

7. We challenge the implications of the following statement, p. 6:

"It appears from the supplement to the record filed herein that the Honorable John R. Dethmers participated in the decision affirming the conviction of petitioner although he was, at the time of said prosecution, the chief prosecuting officer of the state. It appears also from said supplement to the record that he participated in the denial of the motion for rehearing in the Supreme Court contained in said supplement".

To show that Mr. Justice Dethmers, while Attorney General, had absolutely nothing to do with this case, we set forth the following facts:

(a) As already shown, Attorney General Dethmers did not participate in the prosecution of the cause in the trial court.

(b) In the Supreme Court the following occurred:

In May 1945, petitioner filed an application for leave to appeal from the judgment of conviction.

June 4, 1945, a brief was filed by the prosecution in opposition to the application for leave to appeal; that brief was not signed by the Attorney General, but it was subscribed by the special prosecuting officer and two of his assistants. The appeal was granted on the 7th day of June 1945.

May 7, 1946, after the lapse of 11 months devoted to settlement of the bill of exceptions (in which the office of the Attorney General did not participate), the printed record was filed in the Supreme Court, but the name of the Attorney General does not appear thereon or therein.

July 1, 1946, this case was included in a list of cases then pending in the Supreme Court, in the biennial report of the Attorney General; but such a list was prepared by the secretary of the Solicitor General from the Supreme Court records. Neither the Attorney General nor his Solicitor General (in charge of such matters) had participated in the case, and inclusion in such a list is not significant.

Sept. 9, 1946, the Honorable John R. Dethmers ceased to be Attorney General upon elevation to the bench of the State Supreme Court.

Sept. 11, 1946, petitioner filed his brief in the office of the clerk of the Supreme Court and served copies on the staff of the special prosecuting attorney. If such copies were served on the department of the Attorney General, they were received in the name of Foss O. Eldred, the successor to Mr. Dethmers.

In October, 1946, the cause was listed as No. 76 for that term of court, the name of Foss O. Eldred appearing among others as Attorney General.

Jan. 1, 1947, when the present Attorney General took office, the matter was assigned to the Solicitor General and others for the preparation of a brief and argument of the cause.

It was not until June 1947, however, that the State's brief was filed and the cause was submitted on oral argument.

8. Although counsel are correct in stating that the Attorney General possesses the power of supervision over the prosecuting attorneys, and that he may intervene in the prosecution of any criminal case, that privilege is seldom exercised. And in the Supreme Court the Solicitor General has charge of state cases.[9]

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[9] Mich. Revised Stat., chap. 10, § 28, as amended by Act No. 144, Pub. Acts 1939; Mich. Stat. Ann. Cump. Supp. 1947 § 3.181.

IV

The Argument

Point One[10]

Petitioner's claim that he was denied due process because the preliminary examination required by Michigan law was conducted by the circuit judge who issued the warrant after a grand jury investigation, and because the same judge heard his subsequent motions, was not made in the court of first instance; and it was abandoned in the court of review.

Petitioner's contention is as follows: (1) under the laws of the state of Michigan,[11] a circuit judge is not a magistrate and may not conduct a preliminary examination; (2) that he was entitled to have his case heard before a judge or magistrate who had not previously determined it; therefore, his right to due process was denied when the circuit judge who issued the warrant, presided at the preliminary examination, and heard his motion to quash (872) and his motion for a separate trial (875).

The short answer is that such questions were not properly raised below.

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[10]

This covers petitioner's points I and II, brief, pp. 14-18.

[11]

Mich. Code of Criminal Procedure, chap. 6, § 1 et seq., defining the procedure on preliminary examination (3 Comp. Laws 1929, § 17193 et seq. [Stat. Ann. § 28.919 et seq.]); and id., chap. 7 § § 3 and 4 (3 Comp. Laws 1929, § § 17217 and 17218 [Stat. Ann. § 28.943 and 28.944]), pertaining to grand jury investigations.

1. Petitioner did not see fit, in settling his bill of exceptions, to include a transcript of the preliminary examination or the magistrate's return; and there is a gap in the printed record between the warrant (7-10) and the information (11). Had he intended to stress the point now emphasized, he should have done this. There is, therefore, no record of any protest the petitioner may have made during the preliminary examination.

2. Although petitioner assigned as one of the grounds of his motion to quash the information, that the prosecution by the people was a violation of the due process clause of the Fourteenth Amendment (873), he failed to point out in what respect his constitutional rights had been violated; and he certainly did not in that connection question the right of the circuit judge to preside over his preliminary examination; nor was the objection raised in his motion for a separate trial (875-877). No affidavit of prejudice was filed; the point was not made during the progress of the trial itself, or in the motion for new trial (878).

3. It was not until an appeal had been taken (800-801) that petitioner raised the question in Nos. 2 and 3 of his assignments of error (803). But having raised it there, he abandoned the question.

4. The question was abandoned in petitioner's brief because it was not included in appellant's statement of questions involved, and it was not discussed in argument.

In view of the foregoing we hereby request of the Court its permission to file 8 copies of the petitioner's brief in the Supreme Court of the State of Michigan.

5. And finally, be it said, the Supreme Court of the State of Michigan did not pass upon the foregoing questions.

Federal questions which the highest state court is, by its settled practice, justified in disregarding, either because not assigned or because not noticed or relied upon in the brief or argument of counsel, will not serve as the basis of writ of error (or certiorari) from this Court,

Hulbert v. Chicago, 202 U.S. 275;

Cox v. Texas, 202 U.S. 446.

Point Two

No member of the Michigan Supreme Court was disqualified to sit and determine the issues involved; nor was the question raised in the court below.

Counsel for petitioner are misinformed or mistaken as to the facts when they state, brief, pp. 18-19:

> "Justice John Dethmers was Attorney General of the State of Michigan during the time of the trial of this case in the circuit court for the county of Ingham and during all of the time that the matter was being appealed to the Supreme Court up to some time in the Fall of 1946 when he was appointed to the Supreme Court to fill a vacancy. During that time the case was tried, the matter was appealed to the Supreme Court, the bill of exceptions settled and filed and the record printed, bill of exceptions being settled March 19, 1946 (14), and petitioner's brief was filed September 11, 1946".

As disclosed by our counter-statement of the case, Attorney General Dethmers had no part in the prosecution of the case against Senator Delano; he was never consulted

in the matter; he did not intervene in the cause at any stage of the proceedings; and the prosecution was conducted by a special prosecuting attorney, not by an appointee of the Attorney General.

The bill of exceptions was settled in behalf of the State by prosecuting officers who tried the case, not by any member of the office of the Attorney General; and the record when printed carried the names of the prosecuting attorney and his assistants as counsel for the State. The name of Attorney General Dethmers does not appear throughout the entire record, and petitioner's brief was filed two days after he had been sworn in as a member of the Supreme Court.

It was not until January 1947 that the Solicitor General assumed charge of the cause on appeal and, in collaboration with others, prepared the State's brief.

Petitioner also says, p. 21, 'that the order denying the motion for rehearing bears the name of Leland W. Carr, Chief Justice . . If Judge Carr (who as circuit judge issued the warrant) did so participate then petitioner has not had fair consideration of his motion for rehearing and due process of the law has again been denied him'.

Again, counsel are mistaken; the Chief Justice did not participate in the court's consideration of petitioner's motion for rehearing; inclusion of his name on the printed order is a clerical error presently rectified by a corrected certified copy of the journal entry duly transmitted to the clerk of this Court.

Moreover, counsel for petitioner raised no objection by means of an affidavit of prejudice or otherwise, to the participation of Mr. Justice Dethmers.

Point Three

Petitioner did not specially set up or claim that remarks of the prosecuting officer denied him due process of law; and there is no substance to his present claim.

While it is true that in his 9th assignment of error (804) petitioner stated that 'because of the continuous, studied, and wilful prejudicial misconduct of the special prosecutor . . during the process (sic) of the trial in his repeated derogatory and belittling remarks directed to . . (defense) counsel, . . which remarks were calculated to and did bias the jurors . . . resulting in a miscarriage of justice', he never urged that he had thereby been denied due process of law.[12]

In his brief filed below counsel posed the question in a manner clearly indicating a non-federal problem:

> "Did the continuous, studied and wilfully prejudicial conduct of the special prosecuting attorney, during the process of the trial, amount to reversible error?"

He did not inquire whether such conduct resulted in dissolution of the trial court, thus depriving the petitioner of his liberty without due process of law; and in arguing the point, he only cited Michigan decisions. One looks in vain

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[12]

The term 'miscarriage of justice', as used in the foregoing assignment probably indicates the pleader's intent to bring himself within that provision of the Michigan code of criminal procedure which forbids reversal of a judgment or verdict unless the error assigned 'has resulted in a miscarriage of justice'. Mich. Code of Criminal Procedure, chap. 9, § 26; 3 Comp. Laws 1929, § 17354; Mich. Stat. Ann. § 28.1096.

for citation of the federal authorities on which defense counsel now relies, including

Buchalter v. State of New York,
319 U.S. 427.

The court below had this to say of such remarks:

> "Space will not permit us to enumerate these remarks in detail. In many instances these statements were made without being followed by objections by defense counsel, while in other instances when rulings were requested, such rulings were given and the jury instructed upon the same. . . We have examined the record carefully and note that the case was hotly contested, but we are not convinced that the remarks complained of influenced the jury adversely to the rights of the defendants". 318 Mich. 568-569.

That opinion is based upon sound doctrine to which the Michigan Supreme Court is committed:

> "Great care should be taken by prosecuting officers and trial courts that no statement be made in the presence of jurors which would jeopardize a defendant's rights to a fair trial. But in the haste and heat of a trial it is humanly impossible to obtain absolute perfection, and of necessity some allowance must be made in determining whether impromptu remarks are to be held prejudicial if they are made in good faith, and, when fairly construed, they do not appear to have been such as influenced the jury adversely to the rights of the accused".

People v. Burnstein, 261 Mich. 534, 538.

There are several answers to petitioner's present claim that he was denied due process of law:

1. The defendants were represented by competent counsel throughout the trial whose duty it was to aid the court by calling attention to any failure to proceed with propriety.

People v. Frontera, 186 Mich. 343, 346.

"It is the (Michigan) rule in criminal as well as in civil cases, that the attention of the trial court must be directed to improper argument by timely objections, and its propriety at once determined by a ruling of the trial judge. Exceptions to argument, where no ruling is asked for or obtained, will not be considered on appeal. The object of the rule is to have all such alleged errors corrected by the trial court, if correction is necessary".

Gillespie, Michigan Criminal Law & Procedure, Vol. I, § 498, pp. 608-609, footnotes 16 and 17.

As the Court will observe in scanning the record, statements of the prosecuting officer, in the majority of instances, were made without objection by defense counsel, and no judicial ruling was requested or obtained; indeed, in most of them, argument between opposing counsel was carried forward by the defense on the same plane of repartee. As the Michigan court has said:

"Such colloquies between court and counsel are not unusual in the trial of causes, and especially in criminal cases, and the average juror knows it and understands it. He does not charge up against the client all the unpleasant things that may be said to counsel",

> *People v. Kimbrough,* 193 Mich. 330, 334, speaking of a remark of the trial judge, but applicable in principle, we think, to remarks of opposing counsel.

Although the appellants in the court below contended (brief, pp. 6292) that 'continuous, studied and wilful prejudicial conduct of the special prosecuting attorney' amounted to reversible error, they withheld such a contention from the court of first instance until the verdict had been rendered and a motion for a new trial had been filed. They failed to ask for a declaration of mistrial when the remarks were made. And now, for the first time in any court they claim that petitioner was denied due process of law. Such a legalistic ambush is seldom tolerated.

Since it would be impossible (in a summary brief) to discuss each of the many assignments of error based on such remarks, a few will suffice merely by way of illustration:

Assignment No. 25

During cross-examination of the people's witness Fred Chase, secretary of the senate, by counsel for Sherman, the question was asked whether Chase could tell the dates on which bills were introduced by Senator Burhans (not the bill in question). The prosecutor objected on the ground that this was going too far afield (272), and the court stated the objection would be sustained because 'that shows in this book here now what bills he introduced and that is already in'.

Then, the following took place (272-273):

"**Mr. Platt** (Counsel for Sherman): Your honor, we sat

here for an hour and a half and Mr. Sigler read everything in the book—

Mr. Sigler: I ask that remark be stricken from the record and the jury instructed to disregard it.

Mr. Platt: The exhibit number 1, which contains—

Mr. Sigler: *In addition to that, the court has ruled, and counsel ought to be courteous enough to follow the court's ruling, without arguing with him.*

The Court: Go ahead. If there is anything of importance, I am not here to interfere with your putting it in. There is no use of cluttering up the record with a lot of unnecessary things, that is all I am interested in.

Mr. Platt: We simply introduced that and were not permitted, while the prosecution were allowed—

The Court: Just a minute, I am not allowing the prosecution to do anything I wouldn't allow you to do. If there is an objection, I will sustain it. I sustained the objection, now go ahead".

The italicized words on which error was predicated, when restored to their context, appear harmless; and if otherwise, it seems to us it was the duty of trial counsel to direct the judge's attention to their degree of prejudice. But instead of objecting to them as prejudicial, he continued to press his argument on admissibility of the testimony. This, we submit, is a perfect example of combing the record for cold scraps of error on which to build an appeal. And counsel entirely overlooked the remark of a defense attorney which seems to have started the 'tiff'.

Assignment No. 28

The remark here complained of (275) followed further cross-examination on the subject of committee clerks or stenographers (argument with the witness Fred Chase). The prosecutor said:

> "We are not trying this like a bunch of small boys, and I object to that kind of conduct on the part of counsel".
>
> No objection was made to this statement, but
>
> "**The Court**: All right, let's get along. The jury understands, they are intelligent people".

We respectfully submit that took care of the situation. The gentle jab drew no blood, and the remarks could not possibly prejudice the rights of the accused.

Assignment No. 31

Appellants' counsel object to a remark (290) of the prosecutor (made during the State's direct examination of McDonald) to the effect that he would 'show you plenty before we get through'. But the remark, as we view it, was self-invited, and no objection was interposed. Here is the interchange between counsel:

> "**Q.** . . . What was the discussion between your group concerning Carl DeLano's activity on that bill, then?
>
> **Mr. Blackman**: I object to that, that there is no evidence here of any conspiracy. There is no proof of the corpus delicti. There is nothing to connect Carl DeLano with it.

Q. You can't put in all the evidence of a conspiracy at once.

Mr. Blackman: I know, but you haven't shown any yet.

Mr. Sigler: *Well, we will show you plenty before we get through.* [This is the remark on which error is assigned].

Mr. Blackman: Maybe you won't.

The Court: Well, go ahead, take it subject to Mr. Blackman's objection if it leads up to this charge. All this, of course, is mere historical background prior to 1939".

The ruling was accepted from there on, and counsel for petitioner did not object to the remark, but chose to reply in kind. We respectfully submit the episode was harmless.

Assignment No. 61

Counsel complain that 'Mr. Sigler said to Mr. Kennedy: "Well, you are not the only lawyer here, though. You may be surprised to know that" (467). And the following transpired:

"**Mr. Kennedy:** I am not surprised to know that, Mr. Sigler. Certainly, your honor, I take exception—

The Court: State your question, and I will make a ruling on it. Make your questions at this time".

The reason for the exchange of pleasantries was that the special prosecutor interpreted questions of one of the other defense counsel as having opened the door to examination

regarding Williams' background. Mr. Kennedy objected to re-direct examination on the ground that his questions had been specifically limited to 1938 and 1939. The prosecutor merely pointed out that his re-direct examination was based upon cross-examination by one of the other defense counsel.

And certainly petitioner's counsel made no objection to the remark directed to Mr. Kennedy, who, by-the-way, represented clients who were acquitted.

We respectfully submit that the foregoing will suffice to illustrate the points which counsel have urged. The incidents involved are likely to occur in the trial of any criminal case.

> "The trial of this case was, of necessity, lengthy, but a mistrial should not be declared in consequence of mere irregularities which are not prejudicial to the rights of the persons prosecuted. . . . . 'The test is not whether there were some irregularities but instead did the defendants have a fair and impartial trial' ",
>
> *People v. Watson*, 307 Mich. 596, 606.

> "It is quite impossible in a heated trial of this character wherein counsel are strenuously asserting their respective contentions that some remark may not be made by either court or counsel which might better be omitted",
>
> *People v. Reading*, 307 Mich. 616, 625.

2. In many instances where objections were raised to remarks of the special prosecutor, error, if any, was corrected by proper judicial instruction.

Here are two examples:

Assignment No. 55

During cross-examination of Dr. McDonald by counsel for defendant Alden, the prosecutor observed (449):

"Exhibit 41 (minutes of the ANA), the 30th of April, they raised some money, don't you know, to pay the boys" (assigned as error).

The following then occurred:

"**Q.** Now, Mr. Sigler, you know better than that.

Mr. Sigler: No, that is what they did. That is what it says here.

Q. I object to the statement of counsel.

Mr. Sigler: I am just trying to be helpful to my distinguished brother, your honor.

The Court: *The jury will please bear in mind the nature of the conversation that has just taken place. It is just between counsel, not evidence in the case".*

Counsel now add that the special prosecutor later admitted (449) 'that there was no such statement or matter in the records' (of the ANA). We respectfully submit the prosecutor is to be commended for having corrected his error, and that the court's instructions cured it. Moreover, the remark proved harmless, for there is ample proof to justify the jury in believing that money was raised at this meeting to pay legislators.

Assignment No. 84

On page 70 of the DeLano brief, counsel stated: 'Referring to an objection by Mr. Blackman, Mr. Sigler said: "Just a second, if the court please, my obstreperous brother here, he knows that is not a proper foundation for a question or objection" ' (539).

> "**Mr. Blackman**: I object to being called obstreperous. I have a right to protect my client and I object to that and ask the jury be instructed to disregard it.
>
> **The Court**: All right, they may disregard it. The jury understands what is transpiring. You are intelligent people. Go ahead and put your question".

The word 'obstreperous' has several shades of meaning, and it is possible the prosecutor merely intended to convey the thought that opposing counsel was 'clamorous in opposition' (Century Dictionary). But whatever was meant, the remark was cured in the manner requested by the offended party.

3. It may also be noted that defense counsel complained of remarks made by the prosecuting officer to counsel for defendants thereafter acquitted by the jury (573, 577, 578, 593, 600, 602, 603, 681). Surely this is some evidence of the fact that the jury were not biased or prejudiced by such remarks.

We respectfully submit, as we contended in the court below, it is not good practice nor is it fair for defense counsel to await conviction in a criminal case and then, for the first time, comb the cold record for any remarks of the prosecuting officer which might be urged as error or denial of due process; it is not fair to the trial judge.

Point Four

Petitioner was prosecuted for an offense punishable under the laws of the State of Michigan and in so holding the court below decided a non-federal question.

Section 505 of the Michigan Penal Code provides:

> "Sec. 505. Any person who shall commit any indictable offense at the common law, for the punishment of which no provision has been expressly made by any statute of this state, shall be guilty of a felony, punishable" etc. 5 Comp. Laws 1929, Mason's Supp. 1940, § 17115-505; Mich. Stat. Ann. § 28.773.

The Michigan Supreme Court has repeatedly held, by virtue of the foregoing statutory provision, that a conspiracy to obstruct justice, or to commit an otherwise corrupt act, or to accomplish some other unlawful end, or a lawful end by unlawful means, is punishable as a criminal offense under the law of this State:

People v. Tenerowicz, 266 Mich. 276;

People v. McKenna, 282 Mich. 668;

People v. Smith, 296 Mich. 176;

People v. Causey, 299 Mich. 340;

People v. Ryan, 307 Mich. 610;

People v. Roxborough, 307 Mich. 575; cert. denied, 323 U.S. 749; rehearing denied, 323 U.S. 815;

People v. Ormsby, 310 Mich. 291;

People v. Norwood, 312 Mich. 266;

People v. Heidt, 312 Mich. 629.

The court below held that the offense charged in the information filed in this cause, *viz.*, a conspiracy to corrupt the legislature by means of bribery, was an offense known to the law of Michigan, and punishable thereunder.

Counsel contends that in so holding the court below denied him due process of law. He argues 'there can be no conspiracy to commit a crime where a concert of action and plurality of agents are necessary elements of the substantive offense for the commission of which a conspiracy is alleged to have been formed', and he applies the principle known as the 'Wharton Rule' to cases of bribery. And it is said that this rule 'has become a part of the common law of the United States'.

A sufficient answer, at least for the present purpose, is that the conspiracy involved in this cause was much broader in scope than a single criminal transaction between a bribe-giver and a bribe-taker.

The common-law conspiracy charged in the State's information (which the jury by their verdict found to exist) was broad in scope, far-reaching in effect, and it required an ever-increasing number of participants, whereas the Wharton rule as exemplified in the *Dietrich* case on which counsel relies,

United States v. Dietrich, 126 Fed. 664,

has a short reach and a narrow scope. The agreement or transaction stated in the *Dietrich* indictment, 126 Fed. 666, 'was immediately and only between two persons, one charged with the intended taking and the other with the intended giving of the same bribe'.

In the case at bar, we have members of a group organized to promote a bill to legalize the practice of a profession in which they were hoping to engage; we have proof of a common intent to procure its enactment 'by paying legislators'; we have the hired lobbyist (a member of the group) who engineers for them a growing scheme of dishonesty and corruption, who arranges the introduction of the bill in the senate by agreeing to pay two of its members (Shea and Howell) the 'cost' of such legislative process, who raises from his co-conspirators the amount thus demanded, and who pays the money therefor. We have evidence of the further payment of money to these members of the senate to get the bill out of the committee which has it in charge. And, in furtherance of such a general scheme of corruption, we have evidence that the hired lobbyist of this group paid $2,000 raised from its members, to a member of the senate (DeLano) who agreed to use it as best he could to influence members of a house committee to release the bill, and thus assure its final passage.

It cannot be said, we think, that the rule in the case of *United States v Dietrich, supra,* applies to this case.

Was the 'end' of the combination thus formed, 'unlawful'? Our answer is, its object was corrupt, dishonest and a fraud on the sovereign State,

Glasser v. United States, 315 U.S. 60, 66;

United States v. Manton, 107 F 2d 834, 839;

People v. Tenerowicz, 266 Mich. 276;

if such an end were attained, it would have an evil influence on society, if it would not destroy it entirely,

Smith v. People, 25 Ill. 17;

and it would 'by reason of the power of the combination' be 'particularly dangerous to the public interests',

Comm. v. Waterman, 122 Mass. 43, 57.

The conspiracy in this case is doubly vicious, for not only was it a combination 'to accomplish an unlawful end', *People v. Di Laura,* 259 Mich. 260, but it was a wide-spread agreement to accomplish the unlawful end of corrupting the legislature by 'the unlawful means' of bribery. For if one may stomach the idea that the corruption of a legislature is not an unlawful end, he will not retain it long when he considers the unlawful means planned to be employed by the conspirators.

And, finally, we can detect no fine distinction between a conspiracy to obstruct justice *(Manton, Glasser, Tenerowicz, supra),* and a conspiracy to corrupt legislation and thus obstruct the normal processes of a democracy.

We, therefore, respectfully submit that the petitioner was convicted of an offense punishable under the laws of the State of Michigan, and that the court below, in so holding, decided a non-federal question.

V

Conclusion

We, therefore, respectfully submit that since no federal question of substance was raised in the court below, the petition for certiorari should be denied.

Respectfully Submitted,

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